Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

W. DAVID LEAK, M.D., AND
PAIN CONTROL CONSULTANTS, INC.

Petitioners,

against

GRANT MEDICAL CENTER; GRANT ANESTHESIA ASSOCIATES, INC.; BHAGWAN SATIANI, M.D.; JAMES HIGHLY, D.O.; SAMBIT K. BARUA, M.D.; M. FARID EDWARDS, M.D.; MICHAEL MCKAY, M.D.; CHANG KIM, M.D.; LEE K. ROH, M.D.; KAREN LOGAN, M.D.; JON T. PRESTON, M.D.; BRADLEY GETZ, M.D.; AND; PAUL ADDESSI, M.D.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether conflict among the Circuit Courts of Appeals over the definition of antitrust standing has resulted in improper dismissal of Petitioners' antitrust claims?

The Circuit Courts of Appeals have not uniformly applied the Supreme Court's definition of antitrust standing in Associated General Contractors of California, Inc. v. California State Council of Carpenters et al., 459 U.S 519, 103 S.Ct. 897, 74 L.Ed.2d. 723, (1983), resulting in a conflict of law among the circuits. Petitioners Leak and Pain Control Consultants, Inc. now request that this Court grant certiorari to the United States Court of Appeals for the Sixth Circuit to resolve the conflict, and clarify its ruling on standing in Associated General Contractors, and establish their standing to maintain their antitrust claims against Respondents.

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CONFLICT OF LAW AMONG THE CIRCUITS. PETITIONERS LEAK AND PAIN CONTROL CONSULTANTS, INC. NOW REQUEST THIS COURT GRANT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT TO RESOLVE THE CONFLICT, CLARIFY ITS RULING ON STANDING IN ASSOCIATED GENERAL CONTRACTORS, AND ESTABLISH THEIR STANDING TO MAINTAIN THEIR ANTITRUST CLAIMS AGAINST RESPONDENTS. 8

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

To The Honorable Chief Justice and the Associate Justices of the Supreme Court

W. David Leak, M.D. and Pain Control Consultants, Inc., petition for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio (Appendix pp. 3-17), granting summary judgment pursuant to Federal Rule of Civil Procedure 56(c), against Petitioners, on July 18, 1995, was unreported. Only July 28, 1995, Petitioners filed a timely motion to reopen summary judgment pursuant to Federal Rule of Civil Procedure 59(a). Said motion was denied by the District Court on October 18, 1995. Petitioners filed a timely Notice of Appeal pursuant to Federal Rule of Appellate Procedure 3 on November 6, 1995. The opinion of the Court of Appeals for the Sixth Circuit, affirming the District Court, (Appendix pp. 19-20) was issued on December 13, 1996, similarly an unreported decision.

JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 1996, (Appendix pp. 19-20). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The Sixth Circuit Court of Appeals had jurisdiction pursuant to its appellant jurisdiction over final decisions of the District Courts, 28 U.S. C. § 1291. The United States District Court, Southern District of Ohio, Eastern Division, had jurisdiction over Petitioners' claims pursuant to 28 U.S.C. §§ 1331, 1337, 1367, and 15 U.S.C. §§ 1 and 2.

STATEMENT OF THE CASE

Petitioner W. David Leak, M.D. is a physician licensed to practice medicine in Ohio and Pennsylvania. Dr. Leak's practice specializes in pain medicine. He has earned a national reputation and attracted a significant number of out of state patients. Furthermore, Dr. Leak has served as an expert consultant to out of state physicians and on national medical committees and was on the Examination Council of the American College of Pain Medicine.

Petitioner Pain Control Consultants, Inc. (PCC) is an Ohio corporation which provides comprehensive treatment for acute and chronic pain. Dr. Leak is the director and sole shareholder of PCC. A substantial portion of PCC's revenue is received from out of state sources, including federal Medicare and Medicaid funds and private insurance plans. In addition, a substantial portion of PCC's expenditures are to out of state vendors.

Respondent Grant Medical Center (Grant) is a hospital located in Columbus, Ohio. Respondent Grant Anesthesia Associates, Inc. (GAA) is an Ohio corporation which

provides anesthesia services to Grant. The following physicians comprised GAA, and are individual Respondents: James Highly, D.O.; Sambit K. Barua, M.D.; M. Farid Edwards, M.D.; Michael McKay, M.D.; Chang Kim, M.D.; Lee K. Roh, M.D.; Karen Logan, M.D.; Jon T. Preston, M.D.; Bradley Getz, M.D.; and, Paul Addessi, M.D. Respondent Bhagwan Satiani, M.D. is a member of Grant Medical staff and was Chair of the Credentials Committee at Grant.

Since 1984, Dr. Leak has been a Board Certified anesthesiologist specializing in pain medicine. Pain medicine deals with the diagnosis and treatment of acute and chronic pain, and is an area of practice distinct from the general practice of anesthesiology. A various times since 1988, Dr. Leak had been granted medical staff privileges at Grant to treat patients on a case by case basis.

On July 1, 1991, Dr. Leak submitted an application for medical staff privileges at Grant. Because the application had no department category for "Pain Medicine," Dr. Leak specified "Anesthesia" and "Surgery" as the departments for which he was seeking privileges. On March 3, 1992, Dr. Leak specified that he wished to confine his privileges to the area of comprehensive pain medicine and did not wish privileges for administering anesthesia services. Dr. Leak's application met each and every requirement for appointment to the Grant Medical staff, as set forth in Grant Medical Center's staff bylaws. On April 18, 1992, Dr. Leak received a letter from Grant, conferring provisional status in the Department of Anesthesia. A delay of nearly one year then ensued. On March 25, 1993, Respondent Edwards

advised Dr. Leak by letter that his application for privileges could not be processed because Grant had entered into an exclusive contract with GAA for the delivery of anesthesia services and that, "pain control management is included in the provision of anesthesia services." In response, Dr. Leak wrote a letter to Respondent Edwards on April 5, 1993 explaining that the field of pain medicine is multi-disciplinary and is not the same as pain management and is not confined to anesthesia services.

Under most of the managed care insurance plans where Grant Hospital is designated as a provider hospital, patients do not have a choice or are penalized for using a hospital not designated under the plan or a physician not on the staff of the designated hospital. Under most of the plans designating Grant as a provider hospital, Park Medical Center and Columbus Community Hospital, the two hospitals where Dr. Leak currently has staff privileges, are not designated hospitals. Therefore, patients under these plans must for insurance purposes be admitted to Grant or another hospital designated under the plan and use physicians on staff at Grant or other designated hospitals. Patients will rarely choose a hospital or physician not designated under their insurance plan.

As a result of the denial of privileges by Grant, and the exclusive contact between Grant and GAA, Dr. Leak was effectively precluded from treating and consulting on patients in need of hospitalization, where their insurance plans specified Grant and did not specify either of the two hospitals where Dr. Leak has staff privileges. Such patients were also

effectively denied the ability to use Dr. Leak's services due to the denial of privileges to Dr. Leak by Grant and the exclusive contract between Grant and GAA.

The practice of pain medicine is more cost efficient than the traditional practice of pain management by hospital based anesthesiologists. There is also a significant qualitative difference between the practice of pain medicine and the traditional practice of pain management by hospital based anesthesiologists. Pain medicine seeks a long-term solution to pain, rather than simply temporary relief.

Presently, no member on the medical staff of Grant or GAA has training or qualifications comparable to Dr. Leak's in the field of pain medicine.

STATUTORY SCHEME

This case presents issues concerning standing to maintain an antitrust action under the Sherman Act, 15 U.S.C. §§ 1 and 2. Section 1 of the Sherman Act reads in part as follows [15 U.S.C. § 1]:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 2 of the Sherman Act reads as follows [15 U.S.C. § 2]:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

THE DISTRICT COURT PROCEEDINGS

The instant action was filed in the United States District Court for the Southern District of Ohio, Eastern Division, on February 9, 1994. Respondents filed answers to Petitioners' Complaint and discovery ensued. Thereafter, Respondent filed a Motion for Summary Judgment, on the issue of Petitioners' antitrust standing, which the Court granted on July 18, 1995, disposing of all claims . (Appendix, pp. 1-2). On July 28, 1995, Petitioners filed a timely motion to reopen summary judgment pursuant to Federal Rule of Civil Procedure 59(a). Said motion was denied by the District Court on October 18, 1995. Petitioners filed a timely Notice of Appeal pursuant to Federal Rule of Appellate Procedure 3 on November 6, 1995.

THE SIXTH CIRCUIT DECISION

On December 13, 1996, The United States Court of Appeals for the Sixth Circuit issued a brief opinion, affirming the District Court's ruling against Petitioner and agreeing with the District Court's reasoning, (Appendix, pp. 19-20).

ARGUMENT FOR GRANTING THE WRIT

I. THE CIRCUIT COURTS OF APPEALS HAVE NOT UNIFORMLY APPLIED THE U.S. SUPREME COURT'S DEFINITION OF ANTITRUST STANDING ANNOUNCED IN ASSOCIATED GEN. CONTRACTORS OF CALIFORNIA, INC. v. CALIFORNIA STATE COUNCIL OF CARPENTERS ET AL., 459 U.S 519, (1983), RESULTING IN A CONFLICT OF LAW AMONG THE CIRCUITS. PETITIONERS LEAK AND PAIN CONTROL CONSULTANTS, INC., NOW REQUEST THAT THIS COURT GRANT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT TO RESOLVE THE CONFLICT, CLARIFY ITS RULING ON STANDING IN ASSOCIATED GEN. CONTRACTORS, AND ESTABLISH THEIR STANDING TO MAINTAIN THEIR ANTITRUST CLAIMS AGAINST RESPONDENTS.

In Associated Gen. Contractors, 459 U.S. 519, (1983), this Court considered a dispute between parties to a multi-employer collective-bargaining agreement. The Petitioner alleged that the union and its members coerced third parties to enter into business relationships with nonunion firms, adversely affecting the trade of certain unionized firms and restraining the business activities of the unions. Requesting treble damages under Sec. 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Sec. 15, the unions presented to the Court the issue whether the unions had been, "injured in [their] business or property by reason of anything forbidden in the antitrust laws."

Analogizing Section 4 of the Clayton Act to Sections 1 and 7 of the Sherman Act, the Court noted that the lower federal courts virtually unanimously concluded that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. Stressing a need for judicial economy in limiting the types of cases a court would address, the Court discussed that the broad language of Sec. 4 of the Clayton Act would not permit every person tangentially affected by an antitrust violation to recover triple damages. To decide which plaintiffs might recover, and to specifically address the Union's standing to maintain suit, the Court stated its definition of standing in footnote:

> . . . as was required in common-law damages litigation in 1890, the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. [31]
>
> [31] The label "antitrust standing" has traditionally been applied to some of the elements of this inquiry. As commentators have observed, the focus of the doctrine of "antitrust standing" is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action. . . . Associated Gen. Contractors, 459 U.S. at 535.

Refraining from issuing a black-letter rule of law on antitrust standing, this Court listed several factors which control antitrust standing, including the causal connection between an antitrust violation and harm to the Plaintiff; the nature of the plaintiff's alleged injury and the economic freedom of participants in the relevant market; plaintiff's status as either a consumer or a competitor in the market in which trade was restrained; whether plaintiff's injury was of the type of injury to competition which Congress intended the antitrust laws to forestall; the directness or indirectness of plaintiff's injury; and the degree of speculativeness of plaintiff's damages, Associated Gen. Contractors, 459 U.S. at 538-543.

Evaluating all of the announced factors, this Court concluded the Union lacked sufficient consequential harm resulting from an antitrust law violation:

> . . .the Union's allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as a matter of law. Other relevant factors - the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy - weigh heavily against judicial enforcement of the Union's antitrust claim. Associated Gen. Contractors, 459 U.S. at 545.

From a footnote in Associated Gen. Contractors, antitrust standing became a threshold test for the Circuit Courts to apply to all private parties claiming antitrust injuries. A uniform application, however, did not develop. Several Circuits developed different factors to analyze when deciding an antitrust plaintiff's standing to maintain suit. Petitioner Leak's status with reference to antitrust standing currently lies in issue due to the conflict among Circuits over what constitutes antitrust standing.

In the Second Circuit, the Court of Appeals adopted a two-pronged threshold test for antitrust plaintiffs to

maintain an antitrust lawsuit. In Balaklaw v. Lovell, 14 F. 3d 793 (2d Cir. 1994), the Second Circuit looked to the Seventh Circuit and to Associated Gen. Contractors, 459 U.S. 519, and concluded:

> . . . Over time, courts have developed a two-pronged analysis to determine whether a plaintiff has antitrust standing. As a necessary first step, courts must determine whether the plaintiff suffered an antitrust injury. If the answer to that question is yes, they must then determine whether any of the other factors, largely relating to the directness and identifiability of the plaintiff's injury, prevent the plaintiff from being an efficient enforcer of the antitrust laws. . . . Balaklaw, 14 F. 3d at 796, footnote 9.

The Fifth Circuit followed a similar, two-pronged test, which required a plaintiff asserting an antitrust claim to demonstrate both antitrust injury and antitrust standing. In Walker v. U-Haul Co. of Mississippi, 734 F. 2d 1068 (5th Cir. 1984), the Court held franchisee Walker could not recover from franchisor U-Haul on antitrust claims because he failed to demonstrate antitrust injury, as defined in Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977):

> Walker and U-Haul disagree on whether the district court dismissed Walker's Section 2 claim because Walker lacked standing to assert it or because Walker had failed to offer evidence of any injury to

competition. Proof of both is essential to antitrust recovery. . . . Walker, 734 F. 2d at 1072.

Following Associated Gen. Contractors admonition that, "courts should analyze each situation in light of the factors set forth," 459 U.S. 519 at, 536 n. 33, the Court concluded that Walker failed to demonstrate an injury to competition and therefore could not maintain an antitrust claim.

The Sixth Circuit adopted a five factor test, most recently detailed in Bodie-Rickett and Associates v. Mars, Incorporated, 957 F. 2d 287 (6th Cir. 1992):

> This circuit first articulated the Associated Gen. Contractors factors in Southaven Land Co. v. Malone & Hyde, Inc., 715 F. 2d 1079 (6th Cir. 1983). Those factors on which the standing issue turns are: (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation. Id. at 1085. These factors are to be balanced; no single factor is conclusive. Peck v.

General Motors Corp., 894 F. 2d 844, 846 (6th Cir. 1990).

With little analysis of the five factors, the Court then determined that because there were more direct victims of the allegedly anticompetitive conduct, Petitioner lacked antitrust standing to maintain suit. In other words, plaintiff was not an efficient enforcer of antitrust claims, therefore he did not have antitrust standing regardless of the antitrust injury suffered:

> . . . according to plaintiff's view of the events, the intended targets of Mars' alleged conspiracy were competing manufacturers and wholesale customers. These are the direct victims; Bodie-Rickett is merely an indirect victim and, as such, is not the ideal private party "to vindicate the public interest in antitrust enforcement [.]" Associated Gen. Contractors, 459 U.S. at 542.

The Court also discussed the need to examine an antitrust plaintiff's status in the, "relevant market" as part of its evaluation of standing. The Bodie Plaintiff's failure to qualify as either a consumer or competitor of defendant served as a definitive reason why plaintiff lacked standing.

The Seventh Circuit similarly demanded plaintiffs to demonstrate both antitrust injury and standing, using a multifactor, case by case analysis of standing:

> Standing, . . . examines the connection between the asserted wrongdoing and the claimed injury to limit the class of potential plaintiffs to whose who are in the best position to vindicate the antitrust infraction. . . Greater Rockford Energy and Technology Corp. v. Shell Oil Company, 998 F.2d 391 (7th Cir. 1992).

The Court analogized antitrust standing to tort action elements, looked to Associated General Contractors, 459 U.S. at 533, and concluded an antitrust Plaintiff must satisfy four factors: (1) a duty recognized by the antitrust laws; (2) a violation of the antitrust laws; (3) injury to an interest protected by the antitrust laws and attributable to the antitrust violation (antitrust injury) and (4) a direct link between an antitrust violation and the antitrust injury (standing), Greater Rockford, 998 F.2d 391 at 395. The Court then discussed the need to limit potential antitrust Plaintiffs to only those in the best position to vindicate the antitrust infraction. If a plaintiff is not an efficient enforcer of antitrust laws, the Seventh Circuit will deny that plaintiff standing.

In Todorov v. DCH Healthcare Authority, 921 F.2d 1438 (11th Cir. 1991), the Eleventh circuit Court of Appeals took up the issue of standing, with which it admitted the federal courts had long struggled to determine a precise test for gleaning the proper party to bring an antitrust lawsuit:

> . . . in truth, "[t]he issue of antitrust standing has become somewhat confused." Local Beauty Supply,

> Inc. v. Lamaur Inc., 787 F.2d 1197, 1201 (7th Cir. 1986). A two-pronged approach has slowly developed to examine whether a plaintiff is a proper party and thus should be afforded antitrust standing. First, a court should determine whether the plaintiff suffered "antitrust injury"; second, the Court should determine whether the plaintiff is an efficient enforcer of the antitrust laws, which requires some analysis of the directness or remoteness of the Plaintiff's injury.

To reiterate the Eleventh Circuit's words, the issue of antitrust standing remains confused to this day, with each circuit pronouncing its own interpretation of this Court's holding in Associated Gen. Contractors, 459 U.S. 519 (1983). Plaintiffs, like Petitioners Leak and PCC, fall victim to this confusion, when a Circuit Court applies its individual interpretation of antitrust standing, and denies him or her standing to address antitrust injuries.

The Sixth Circuit agreed with the U.S. District Court that Petitioners lacked antitrust standing because Petitioner Leak had staff privileges at two Columbus hospitals. (Appendix at p. 14).

While the District Court's conclusion appeared to comport with this Court's holding in Summit Health, LTD. et al. v. Pinhas, 500 U.S. 322 (1991), it lies in direct conflict with that opinion and provides an eloquent example why this Court should resolve the Circuit Courts' confusion over what

constitutes antitrust standing. In Summit Health, Id., this Court held removal of one physician from a relevant geographic market does not constitute sufficient injury to competition to qualify as an antitrust injury which Congress designed the antitrust laws to forestall:

> The Court's suggestion that competition in the entire Los Angeles market was affected by this one surgeon's exclusion from that market simply ignores the "practical economics" of the matter. Summit Health, 500 U.S. at p. 338.

Turning to the practical economics of Petitioners' position, definition of the relevant market lies directly in issue, with Petitioners advancing a definition of relevant market which make their exclusion a clear antitrust injury of the kind Congress intended the antitrust laws to forestall: if Petitioner Leak continues to be denied staff privileges at Grant, not merely a single physician will be eliminated from competition in a relevant market; an entire category of treatment, pain medicine, will be eliminated from that relevant market. Petitioner Leak is the only Columbus, Ohio physician who practices pain medicine, a direct competitor of Respondents' pain management practice. Such a result contravenes this Court's holding in Summit Health, 500 U.S. 322 (1991) where merely one physician and not an entire treatment category, were excluded from the market. This Court should grant Certiorari to Petitioners to prevent such erroneous

application of Summit Health, Id., and Associated Gen. Contractors, 459 U.S. 519 (1983).

II. THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S SUMMARY JUDGMENT AGAINST PETITIONERS ON THE BASIS OF AN INFERENCE, DRAWN AGAINST THEM, THAT BECAUSE PETITIONER LEAK HAS HOSPITAL STAFF PRIVILEGES AT TWO HOSPITALS WITHIN THE COLUMBUS AREA, THEY ARE ABLE TO FULLY COMPETE FOR PAIN RELATED MEDICAL SERVICES, AND THEREFORE LACK STANDING TO MAINTAIN THIS ACTION.

Respondents' Motion for Summary Judgement urged the District Court to find that Petitioners lacked standing to maintain this action on the basis that Dr. Leak has privileges at two other hospitals and on the basis that patients and the government would be more efficient enforcers of the antitrust laws. The Court reviewed antitrust case law and correctly stated that to have antitrust standing, a Plaintiff must show antitrust injury. The Court then held that:

> In the circumstances presented in this case, . . . the Court finds that Plaintiffs have not suffered the kind of injury that antitrust laws were designed to prevent. **Dr. Leak has staff privileges at two other Columbus area hospitals. Plaintiffs are therefore**

> **fully able to compete** with others offering pain-related medical services in the Columbus area, including GAA and its members. (Appendix pp. 14-15). (Emphasis added).

In making its finding, the Court drew an inference. The Court inferred that because Dr. Leak has staff privileges at two other hospitals, he is able to fully compete in the Columbus area market for pain-related medical services. The Court then concluded from its inference about Dr. Leak's ability to compete that he had not suffered the kind of injury that antitrust laws were designed to prevent.

Both the U.S. Supreme Court and the Sixth Circuit Court of Appeals have held that when considering summary judgment, all inferences drawn from the evidence must be viewed in a light most favorable to the party opposing the Motion, in this case, Appellants. In United States v. Diebold Inc., 369 U.S. 654 (1962), the United States Supreme Court held that upon summary judgment, the inferences to be drawn from underlying facts contained in pleadings and affidavits must be viewed in the light most favorable to the party opposing the Motion. Because the trial court drew inferences from affidavits in a light disfavorable to the non-movant, the Supreme Court reversed the summary judgment and remanded the case to the trial court for trial on the merits.

In Bender v. Southland Corp., 749 F. 2d, 1205 (6th Cir. 1984), this Court held that summary judgment is not prohibited in antitrust cases, but is disfavored. The general rule that a movant must conclusively show that no genuine

issue of material fact exists and that the movant is entitled to judgment as a matter of law, must be strictly applied with all of the evidence and all reasonable inferences which may be drawn therefrom, viewed in a light most favorable to the party opposing the Motion. The District Court's inference against Petitioners, formed the basis for its holding regarding standing and clearly is erroneous.

The District Court's inference that Petitioners are able to fully compete in the Columbus market for pain related medical services rests upon the presumption that a physician who has privileges at one hospital is able to treat the same patients at a different hospital. If this were simply a case of denial of privileges or of an exclusive contract where the affected physician was able to treat the same patients at another hospital, standing might be a legitimate issue. However, under the facts of this case, as plead and supported by the record, this is not the situation.

The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but better goods and services. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements including quality and service, not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers or providers. National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978). Quality of care is particularly relevant in the area of medical services. See, Robinson v. Magovern, 521 F. Supp. 842, 877 (W.D. PA 1981).

The issue of injury for purposes of antitrust standing does not come down solely to whether a plaintiff is still able to compete at some level. An agreement to restrain trade may be unlawful even though it does not entirely exclude competitors from the market. Activity that prevents consumers from making free choices between market alternatives is inherently destructive of competitive conditions. Associated Gen. Contractors, 459 U.S. at 528 (1983).

In the leading case of Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), the Court held that an exclusive contract for anesthesiological services would constitute an illegal tying arrangement only if patients are forced to purchase the contracting firm's services as a result of the hospital's market power. The Court noted that if no forcing is present, patients are free to enter a competing hospital and use another anesthesiologist. In Jefferson Parish, at 30, the Court specifically noted that there was no evidence that patients were unable to go to another hospital that would provide them with their choice of physician.

Petitioners, have suffered antitrust injury because they have been foreclosed as a result of Respondents' actions from being able to compete in providing in-hospital and in-office consultations and treatment related to the practice of pain medicine to a significant segment of the patient population. That segment of the population is composed of those patients who, due to their managed care insurance plans, are limited to using either Grant or another hospital other than Park Medical Center or Columbus Community Hospital. This

segment of the patient population is a discrete sub-market due to the lack of freedom of choice that they have to chose one hospital over another.

The harm to Petitioners goes beyond not being able to provide in-hospital services to these patients. The denial of privileges results in Dr. Leak not being able to be a designated provider for office based services under managed care plans where Grant is a designated hospital and Park Medical Center or Columbus Community Hospital are not designated. Further, because the practice of pain medicine is not an exclusively hospital based practice, Respondents' interpretation of their contract as applying to procedures and treatments necessary to the practice of pain medicine combined with the requirement that employees of GAA be hospital based means that they have foreclosed all practitioners of pain medicine other than members of GAA from being able to practice at Grant.

In summary: 1) due to the prevalence of managed care insurance plans, a significant percentage of patients are locked into using hospitals designated under these plans or are penalized for using non-designated hospitals; 2) Grant Hospital is a designated hospital under many plans which do not also designate either of the hospitals where Dr. Leak has privileges; 3) the patients covered by such plans represent a sub-market; 4) the denial of privileges to a qualified physician to practice at a particular hospital, deprives the physician of access to those patients for both in-hospital and in-office services and limits the choice of such patients to those

physicians who have been granted privileges at said hospital; 5) denial of privileges therefore results in limiting competition for that segment of the patient population; and 6) limiting competition results in limiting price competition and the consumer's choice based on the quality and nature of services.

Limiting the consumers' choice to purchase services from a specific provider and, likewise, not permitting the provider to sell his services to those consumers is on its face anti-competitive. The number of competitors has been limited by Defendants-Appellees. Other providers of the services are excluded from competing for that same pool of consumers.

Due to managed care insurance plans, Grant has effectively become an essential facility in order for Dr. Leak to provide services to those patients who must use Grant and for those patients to be able to chose Dr. Leak. Therefore, the denial of privileges to Dr. Leak denies them access to an essential facility. The exclusive contract between Grant and GAA requires patients who are admitted to Grant and are in need of pain medicine services to use physicians employed by GAA. This is an unlawful tying arrangement for those patients who do not have the choice of another hospital. They are limited to using physicians who have privileges at Grant.

The exclusive contract between Grant and GAA is also a group boycott of any competitor, including Dr. Leak, who is not a member of GAA. This may not necessarily be anti-competitive if Dr. Leak was able to compete for the same patients without being a member of GAA. However, this is

not the case.

Within the market as presented by the Complaint in this case, Petitioners have suffered the type of injury that the antitrust laws were intended to prevent. They have been eliminated as competitors with respect to a significant segment of the patient population. The anti-competitive effects of Respondents' actions include not only the issue of costs to the consumer, but also prevent consumer choice based upon consideration of the quality of services that are provided by Dr. Leak, his training, skill and experience, and simply personal preference based upon trust, personality, and professional manner, which are so involved with choice of a physician. In addition, there is a difference in the nature of the services offered in the practices of pain medicine and pain management that affect consumer choice.

The District Court, (Appendix p. 14), stated that it was not creating a per se rule that a health care professional could never have standing to assert antitrust claims arising from the denial of hospital staff privileges. However, the Court did just that in essence ruling that if a physician has privileges at another hospital in the same geographic area, he or she can not suffer the kind of injury that the antitrust laws were designed to prevent. While the Court states that its finding is based on the facts of this case, the only fact to which the Court points is that Dr. Leak has privileges at two other hospitals.

To the extent that the Court held as a matter of law, that Appellants lack antitrust standing due to having staff privileges at two hospitals within the same geographic area,

the Court's conclusion of law is in error. Further, the Court's finding of fact that Plaintiffs-Appellants are able to fully compete in the Columbus area is based upon an inference drawn by the trial court adverse to the non-moving parties and is directly contrary to the only evidence in the record with respect to Petitioners' ability to compete, which clearly demonstrates that they are not able to fully compete because Dr. Leak is not able to treat patients who would be required by their insurance to use Grant Medical Center and thereby would be limited to using GAA.

For the above reasons, Petitioners respectfully request that this Court grant certiorari to review the judgment of the Sixth Circuit Court of Appeals.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 11, 1997

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served via U.S. mail upon John H. Burtch, Esq., Baker & Hostetler, Suite 2100, 65 E. State Street, Columbus, Ohio 43215-4260, and on Douglas E. Graff, Esq., 604 East Rich Street, Suite 2100, Columbus, Ohio 43215 on this 13th day of March, 1997.

Donald J. McTigue

FILED

961531 MAR 13 1997

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

W. DAVID LEAK, M.D., AND
PAIN CONTROL CONSULTANTS, INC.

Petitioners,

against

GRANT MEDICAL CENTER; GRANT ANESTHESIA ASSOCIATES, INC.; BHAGWAN SATIANI, M.D.; JAMES HIGHLY, D.O.; SAMBIT K. BARUA, M.D.; M. FARID EDWARDS, M.D.; MICHAEL MCKAY, M.D.; CHANG KIM, M.D.; LEE K. ROH, M.D.; KAREN LOGAN, M.D.; JON T. PRESTON, M.D.; BRADLEY GETZ, M.D.; AND; PAUL ADDESSI, M.D.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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APPENDIX

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21 pp

AO (Rev. 5/85) Judgment in a Civil Case - Filed July 18, 1995

UNITED STATES DISTRICT COURT

Southern District of Ohio

Eastern Division

W. DAVID LEAK, et al.,	**JUDGMENT IN A CIVIL CASE**
Plaintiffs,	
vs	Case No. C2-94-117
GRANT MEDICAL CENTER, et al.,	Judge Smith Magistrate Judge Kemp
Defendants.	

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Opinion and Order filed July 18, 1995, final judgment is hereby entered in favor of defendants, and against plaintiffs', dismissing plaintiffs' federal antitrust claims with

prejudice and dismissing plaintiffs' state law claims without prejudice.

Date: July 18, 1995 KENNETH J. MURPHY, CLERK

/s/ Georganna Willman

By/Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

W. David Leak, et al.,

Plaintiffs,

Case No. C-2-94-117
JUDGE SMITH

-v-

Filed 07/18/95

Grant Medical Center, et al.,

Defendants.

OPINION AND ORDER

Plaintiffs bring this action under federal antitrust laws[1] and state law[2] asserting, inter alia, that defendants improperly denied plaintiff David Leak, M.D., medical staff privileges at Grant Medical Center. This matter is before the Court on defendants' motions for summary judgment (Docs. 19 and 20). Defendants argue that they are entitled to summary

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1 Plaintiffs assert claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2.

2 Plaintiffs assert state law claims of breach of contract, tortious interference with contractual relations, racial discrimination, and violation of Ohio's Valentine Act.

judgment in their favor because plaintiffs have not suffered antitrust injury and therefore lack standing to bring federal antitrust claims. For the following reasons the Court grants defendants' summary judgment motions.

I.

Plaintiff Dr. Leak is a licensed physician who specializes in pain medicine. Plaintiff Pain Control Consultants, Inc. ("PCC") is an Ohio corporation in the business of operating a comprehensive pain treatment center. Dr. Leak is the Director and sole shareholder of PCC.

Defendant Grant Medical Center ("Grant") is an Ohio corporation in the business of operating a hospital in Columbus, Ohio. Defendant Grant Anesthesia Associates, Inc. ("GAA") is an Ohio corporation engaged in the business of providing anesthesia services to Grant under an exclusive contract.

Defendants Bhagwan Satiani, M.D., M. Farid Edwards, M.D., James Highly, O.D., Sambit K. Barua, M.D., Bradley Getz, M.D., Michael McKay, M.D., Chang Kim, M.D., Lee K. Roh, M.D., Karen Logan, M.D., and Jon T. Preston, M.D. are all members of the Grant medical staff and GAA. Defendant Paul Addessi, D.O. was a member of the Grant medical staff.

Since 1988 Dr. Leak periodically has sought and obtained medical staff privileges at Grant on a case-by-case basis. On July 1, 1991, Dr. Leak applied for medical staff privileges at Grant. Dr. Leak specified Anesthesia and

Surgery as the departments for which he sought privileges because the application had no category for pain medicine.

In April 1992 the Grant Anesthesia Department recommended granting Dr. Leak provisional privileges on the condition that Dr. Leak would serve as an on-call anesthesiologist to provide anesthesia services to patients. The Grant Anesthesia Department Bylaws require anesthesiologists to provide on-call services as a condition to obtaining privileges within the department. Dr. Leak did not submit to Grant an on-call schedule, although he avers that he made several attempts to contact the Chairperson of the Anesthesia Department Credentials Committee to discuss the schedule.

On February 26, 1993, Grant entered into an exclusive contract with GAA for the provision of anesthesia services to the hospital's patients. The contract provided that comprehensive pain management[3] was within the range of anesthesia services GAA would offer.

Dr. Leak sent a letter to the president of Grant on March 18, 1993, discussing Dr. Leak's qualifications and asking to meet with the president to discuss his application for privileges. On March 25, 1995, defendant Dr. Edwards sent a letter to Dr. Leak informing him that Grant was unable to

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Dr. Leak draws a sharp distinction between pain medicine and pain management. He avers that pain medicine, in contrast to pain management, seeks long term rather than temporary solutions to pain. Dr. Leak affidavit para. 25.

process his application for privileges because of the exclusive contract with GAA.

In August 1993 Grant advised Dr. Leak that GAA was seeking a Director of Pain Management. It is unclear whether Dr. Leak followed up on this information.

It is undisputed that Dr. Leak has medical staff privileges at two other Columbus-area hospitals: Park Medical Center and Columbus Community Hospital.

II.

The procedure for granting summary judgment is found in Fed. R. Civ. P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. Kress, & Co.*, 398 U.S. 144, 158-59 (1970). Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary Judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to

that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 547 (1986).

The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby, Celotex* and *Matsushita* have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. *Street v. J.C. Bradford & Co.*, 886 F2d 1472, 1476 (6th Cir. 1989). The Court in *Street* identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Id.*, at 1479.

In addition, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Id.*, (quoting *Liberty Lobby*, 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely "'show that there is some metaphysical doubt as to the material facts.'" *Id.* (quoting *Matsushita*, 475 U.S. at 586). Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific

portions of the record upon which it seeks to rely to create a genuine issue of material fact.

III.

Plaintiffs assert eight counts of federal antitrust violation. Counts one through five set forth alleged violations of Section 1 of the Sherman Act, 15 U.S.C. §1.[4] Specifically, Count One asserts that defendants engaged in a group boycott by denying Dr. Leak staff privileges; Count Two maintains that Grant is an essential facility and failure to allow Dr. Leak to share the facility therefore constitutes a *per se* violation of §1; Count Three maintains that the exclusive contract with GAA is an unlawful tying arrangement; Count Four alleges that defendants engaged in unfair acts with the intent of eliminating competition from Dr. Leak; and Count Five asserts that defendants' actions unreasonably restrained trade under the rule of reason theory.

Counts Six through Eight allege violations of Section 2 of the Sherman Act, 15 U.S.C. §2.[5] These Counts claim

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4 Section 1 of the Sherman Act states in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

15 U.S.C. §1.

5 Section 2 of the Sherman Act provides in pertinent part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or

that defendants have monopolized, attempted to monopolize, and conspired to monopolize, the market for in-hospital diagnosis and treatment of acute and chronic pain within the relevant geographic market.

Defendants argue that they are entitled to summary judgment in their favor on all of plaintiffs' federal claims because plaintiffs have not suffered antitrust injury and therefore lack standing.

Plaintiffs also assert state law claims. Defendants contend that because plaintiffs' federal claims must be dismissed, the Court should decline to exercise supplemental jurisdiction over plaintiffs' state law claims. 28 U.S.C. §1367(c)(3); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

The Court will proceed to address whether plaintiff has suffered antitrust injury.

There is no lack of case law discussing antitrust claims by health care professionals against those who have denied them medical staff privileges at hospitals. Numerous legal scholars have compiled and analyzed the legion of decisions on this subject. *See, e.g., ABA Antitrust Section, Annual Review of 1993 Antitrust Law Developments* at 287-95 (1994) (concise overview); Michael G. Macdonald, Kathryn C. Meyer & Beth Essig, *Health Care Law: A Practical Guide* §9.03[1]

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commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

15 U.S.C. §2.

(1994) (concise overview); William S. Brewbaker, III, *Antitrust Conspiracy Doctrine and the Hospital Enterprise*, 74 B.U.L. Rev. 67 (1994) (advocating antitrust scrutiny of medical review board decisions and adoption of mechanisms to ensure that governing bodies' decisions are independent); Josephine M. Hammack, *The Antitrust Laws and the Medical Peer Review Process*, 9 J. Contemp. Health L. & Pol'y 419 (1993) (discussing recent cases and ways hospitals can preserve peer review but reduce threat of antitrust litigation); Tim A. Thomas, Annotation, *Denial by Hospital of Staff Privileges or Referrals to Physician or Other Health Care Practitioner as Violation of Sherman Act*, 89 A.L.R. Fed. 419 (1994) (topical digest of cases); *see also BCB Anesthesia Care Ltd. v. Passavant Memorial Area Hosp. Ass'n*, 36 F.3d 664, 667-68 (7th Cir. 1994) (exhaustive list of decisions with comment that in a vast majority of cases the plaintiff physicians have ultimately been denied relief).

The above authorities offer helpful background on the many theories of liability and defenses in this area of the law. The issue before the Court, however, is a narrow one: whether plaintiffs have standing to assert claims under Sections 1 and 2 of the Sherman Act.

We begin with the general proposition that the health care profession is not immune from scrutiny under federal antitrust law. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 465-66 (1986) (upholding FTC's ruling that dentists violated antitrust laws by agreeing to withhold x-rays from insurers); *Jefferson Parish Hosp. Dist No. 2 v. Hyde*, 466

U.S. 2, 29-31 (1984) (upholding exclusive contract between anesthesiologists and hospital); *Arizona* v. *Maricopa Medical Soc'y*, 457 U.S. 322, 348-49 (1982) (finding physicians' price-fixing agreement violative of antitrust laws). Nor can it fairly be said that a health care professional cannot under any circumstances state a cause of action under the Sherman Act against a hospital review committee for denial of staff privileges. *Summit Health Ltd. v. Pinhas*, 500 U.S. 322, 332 (1991) (holding that physician's claim against peer review committee satisfied the interstate commerce jurisdictional requirements of the Sherman Act); *cf.* Health Care Quality Improvement Act of 1986, 42 U.S.C. §§11101-11152 (providing limited immunity to medical peer review process).

The civil remedies provision of federal antitrust laws is set forth in Section 4 of the Clayton Act, 15 U.S.C. §15, which states in part as follows:

> Any persons who shall be injured in his business or his property by reason of anything forbidden in the antitrust laws may sue . . .and recover threefold the damages by him sustained. . .

Despite the broad language "any person," courts have not allowed "'every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.'" *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*,

459 U.S. 519, 535 (1983) (quoting *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477 (1982)).

> Plaintiff must prove **antitrust** injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive acts made possible by the violation.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (emphasis in original). It is not enough, however, that plaintiffs can show that defendants' conduct caused them injury. *Associated Gen. Contractors*, 459 U.S. at 535 n. 31. Plaintiffs also must show that their injuries were sufficiently direct and that they would be efficient enforcers of the antitrust laws. *See id.*

"[I]t [is] virtually impossible to announce a black letter rule that will dictate the result in every case" to determine this second requirement. *Id.* at 536. Nevertheless, the following factors have been identified for examining whether a plaintiff has antitrust standing:

> 1. the casual connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused;
>
> 2. the nature of the plaintiff's alleged injury including the status of the plaintiff as

consumer or competitor in the relevant market;

3. the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative;

4. the potential for duplicative recovery or complex apportionment of damages; and

5. the existence of more direct victims of the alleged antitrust violation.

Southhaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1085 (6th Cir. 1983) (citing *Associated Contractors*, 459 U.S. at 537-44). Hence, to have antitrust standing, a plaintiff must show: (1) antitrust injury, and (2) under the factors set forth above, that the directness of the injury was such that he would be an efficient enforcer of the antitrust laws.

Defendants cite several cases in which courts have held that health care professionals lacked standing to assert antitrust claims. *See Balaklaw v. Lovell*, 14 F.3d 793 (2nd Cir. 1994) (affirming district court's summary judgment, holding that anesthesiologist lacked antitrust standing to challenge exclusive contract awarded to competing group of anesthesiologists); *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696 (4th Cir. 1991) (affirming district court's summary judgment, holding that physician whose privileges were revoked did not establish antitrust injury); *Levine v. Central*

Fla. Med. Affiliates, Inc., 864 F. Supp. 1175 (M.D. Fla. 1994) (granting summary judgment, holding that internist lacked standing to assert antitrust claims challenging denial of staff privileges); *Rooney v. Med. Ctr. Hosp.*, 1994 U.S. Dist. LEXIS 7420 (S.D. Ohio Mar. 30, 1994) (Beckwith, J.) (granting summary judgment holding that peer review was protected by Health Care Quality Improvement Act and that physician in any event lacked antitrust standing to challenge revocation of staff privileges).

Defendants argue that under the above authorities, plaintiffs cannot, as a matter of law, establish either antitrust injury or that they would be the most efficient enforcers of the antitrust laws. In particular, defendants point out that Dr. Leak has staff privileges at two other Columbus area hospitals, and that Dr. Leak has therefore not been hindered from competing in the market.

Plaintiffs acknowledge that Dr. Leak has staff privileges at other hospitals. They contend that they have nonetheless suffered antitrust injury. Plaintiffs argue, *inter alia*, that they have been foreclosed from offering services to that segment of patients whose managed care insurance plans limit them to using Grant.

The Court does not find, and defendants do not argue, that the above authorities establish a *per se* rule that a health care professional could never have standing to assert antitrust claims arising from the denial of hospital staff privileges. In the circumstances presented in this case, however, the Court finds that plaintiffs have not suffered the kind of injury that

antitrust laws were designed to prevent. Dr. Leak has staff privileges at two other Columbus area hospitals. Plaintiffs are therefore fully able to compete with others offering pain-related medical services in the Columbus area, including GAA and its members.

That some patients' managed care insurance plans may effectively limit them to services offered at Grant does not alter this conclusion. If plaintiffs' practice of pain medicine is, as Dr. Leak avers, truly more cost effective than traditional pain management used by anesthesiologists, then both the hospitals at which plaintiffs have privileges and plaintiffs have a competitive advantage over the defendant anesthesiologists. *See* Dr. Leak affidavit para. 24 & exhibit D. If pain medicine is more cost-effective than traditional pain management, then in an open and competitive marketplace managed care insurance plans should eventually be more inclined to designate those hospitals at which pain medicine is practiced. *See Capital Imaging Assoc., P.C. v. Mohawk Valley Medical Assoc., Inc.*, 725 F. Supp. 669, 673 (S.D.N.Y. 1989) (recognizing that the selective nature of managed care insurance plans is pro-competitive and reduces health care costs).[6] In these circumstances, the Court concludes that

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The court of appeals affirmed the district court's later decision granting summary judgment in favor of the defendants. 791 F. Supp. 956 (S.D.N.Y. 1992), aff'd, 996 F.2d 537 (2d Cir.) cert. denied, 114 S. Ct. 388 (1993).

plaintiffs have failed to allege, or adduce evidence of,[7] the kind of injury that antitrust laws were designed to protect.[8]

The finding that plaintiffs have not suffered antitrust injury is dispositive. With respect to the second requirement for standing, however, it is worth noting that there are "'at least two more easily imagined efficient enforcers. . .patients and the government.'" *Rooney*, 1994 U.S. Dist. LEXIS 7420 at *17 (quoting *Robles v. Humana Hosp. of Cartersville*, 785 F. Supp. 989, 999 (N.D. Ga. 1992)).

For the above reasons the Court holds that plaintiffs lack standing to assert antitrust claims arising from defendants' failure to grant him staff privileges and their use of an exclusive contract. Defendants are therefore entitled to summary judgment in their favor on plaintiffs' federal antitrust claims.

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7 The Court reaches the same conclusion whether it examines the complaint, accepting as true all well pleaded facts, or whether it construes plaintiffs' evidence in the most favorable light. There appears to be some tension concerning the proper procedural posture for the antitrust standing inquiry. For example, in *Rooney*, the learned judge stated that standing is determined from the complaint, but went on to conclude that plaintiffs had not adduced sufficient evidence on the standing issue to withstand summary judgment. 1994 U.S. Dist. LEXIS 7420 at *16-18; *see also BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hosp. Ass'n*, 36 F.3d at 669 (dissenting opinion by Cudahay, J., criticizing the majority for upholding dismissal on the pleadings alone). The Court finds that adequate discovery took place in the instant case to determine standing. *See* Fed. R. Civ. P. 56(f).

8 The Court agrees with defendants that plaintiffs lack standing to seek treble damages as well as injunctive relief.

V.

Having determined that defendants are entitled to summary judgment on plaintiffs' federal claims, the Court declines to exercise supplemental jurisdiction over plaintiffs' state law claims. 28 U.S.C. §1367(c)(3); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

VI.

Based on the above, the Court **GRANTS** defendants' summary judgment motions (Docs 19 and 20).

The Clerk shall enter a final judgment in favor of defendants, and against plaintiffs, dismissing plaintiffs' federal antitrust claims with prejudice and dismissing plaintiffs' state law claims without prejudice.

The Clerk shall remove this case from the Court's pending cases and motions lists.

IT IS SO ORDERED.

GEORGE C. SMITH, JUDGE
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

W. DAVID LEAK, et al.,	:	
	:	
Plaintiffs,	:	Case No. C-2-94-117
	:	
v.	:	Judge Smith
	:	
GRANT MEDICAL CENTER, et al.,	:	
	:	
Defendants.	:	

ORDER

Plaintiffs move for reconsideration of the Court's July 18, 1995 opinion and order and judgment dismissing this case. The Court has examined its July 18, 1995 decision in light of Plaintiff's arguments, and finds that no clear error or manifest justice has occurred. The Court therefore **DENIES** plaintiffs' motion (Doc. 36).

The Clerk shall remove Doc. 36 from the Court's pending motions list.

IT IS SO ORDERED.

_____
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

NOT RECOMMENDED FOR PUBLICATION

NO. 95-4206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

W. DAVID LEAK, M.D., and PAIN CONTROL CONSULTANTS, INC.,	:	
Plaintiffs-Appellants,	:	ON APPEAL FROM THE UNITED
v.	:	STATES DISTRICT COURT FOR THE
GRANT MEDICAL CENTER and GRANT ANESTHESIA ASSOCIATES, INC.	:	SOUTHERN DISTRICT OF OHIO
Defendants-Appellees:	:	

BEFORE: SUHRHEINRICH and DAUGHTREY, Circuit Judges, and JOHNSTONE, District Judge.

PER CURIAM. In this antitrust action, Dr. David Leak, a specialist in pain medicine, and his corporation, Pain Control Consultants, Inc., challenge the legality of an exclusive agreement between Grant Medical Center and Grant Anesthesia Associates, Inc., for the provision of anesthesia serves at the center in Columbus, Ohio. The district court dismissed the suit, concluding that the plaintiffs-appellants lacked standing to prosecute their claim. Before this court, Leak and Pain Control

Consultants now insist that the district court ruling was in error, that they did in fact suffer the requisite antitrust injury as a result of the defendants' actions, and that they are proper plaintiffs to advance this cause of action. We disagree and affirm.

Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of the parties, we are not persuaded that the district court erred in dismissing the complaint. Because the reasons why judgment should be entered in the defendants' favor have been fully articulated by the district court, the issuance of a detailed opinion by this court would be duplicative and would serve no useful purpose. Accordingly, we AFFIRM the judgment of the district court granting summary judgment to the defendants, based upon the reasoning set out by that court in its opinion and order filed July 18, 1995.

Supreme Court, U.S.
FILED
APR 28 1997
OFFICE OF THE CLERK

No. 96-1531

In The

Supreme Court of the United States

October Term, 1996

W. DAVID LEAK, M.D. and PAIN CONTROL CONSULTANTS, INC.,

Petitioners,

vs.

GRANT MEDICAL CENTER; GRANT ANESTHESIA ASSOCIATES, INC.; BHAGWAN SATIANI, M.D.; JAMES HIGHLY, D.O.; SAMBIT K. BARUA, M.D.; M. FARID EDWARDS, M.D.; MICHAEL MCKAY, M.D.; CHANG KIM, M.D.; LEE K. ROH, M.D.; KAREN LOGAN, M.D.; JON T. PRESTON, M.D.; BRADLEY GETZ, M.D. and PAUL ADDESSI, M.D.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS GRANT MEDICAL CENTER, PAUL ADDESSI, M.D. AND BHAGWAN SATIANI, M.D.

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I

STATEMENT OF THE CASE

Petitioner Dr. Leak is a Columbus, Ohio-based physician who specializes in pain medicine. He has staff privileges at two Columbus hospitals, which, according to Dr. Leak's evidence in opposition to Respondents' Motion for Summary Judgment, are participating hospitals in at least seven managed care plans and three traditional insurance plans.

Despite this, Petitioners Dr. Leak and his professional corporation, PCC, Inc., brought this antitrust action alleging that they are unable to compete in the market for pain management services. Petitioners claim they are unable to compete because certain managed care plans designate Respondent Grant Medical Center as a participating hospital but do not also designate either of the two hospitals where Dr. Leak has privileges. Petitioners did not join any managed care plans as parties to this action.

All Respondents filed motions for summary judgment on the basis that Dr. Leak and his professional corporation did not have standing to prosecute a private antitrust claim. Before ruling on the motions, the trial court granted Petitioners' request for additional time to conduct discovery on the standing issue. Petitioners undertook very little discovery during the additional seven months available to them and used none of it to oppose the Respondents' motions for summary judgment.

REASONS FOR DENYING THE WRIT

I.

NO CONFLICT OF LAW EXISTS AMONG THE CIRCUITS.

Petitioners ask for a writ of certiorari so this Court can resolve an alleged conflict of law among the circuit courts in regard to antitrust standing. Petitioners also argue that the decision below is in "direct conflict" with *Summit Health, LTD v. Pinhas*, 500 U.S. 322 (1991). Petition at 16-17. This Court need not grant the writ, however, because no conflict exists among the circuit courts with regard to antitrust standing and no conflict exists between the decision below and *Summit Health*.[1]

In order to find a conflict, Petitioners focus on semantics rather than on the substantial meaning of what the circuit courts say about antitrust standing. Petitioners argue that the purported conflict is caused by inconsistent application of the antitrust standing requirements set out in *Associated Gen. Contractors of California, Inc. v. Carpenters*, 459 U.S. 519 (1983).

Associated Gen. Contractors holds that an antitrust plaintiff must plead and prove both antitrust injury and antitrust standing.

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1. Petitioners' reference to *Summit Health* in this standing case is puzzling. That case presented a jurisdictional question — whether the denial of hospital privileges to a single physician presented "a sufficient nexus with interstate commerce to support federal jurisdiction." 500 U.S. at 333. Petitioners quote from Justice Scalia's dissent as if it were the holding of the Court and then proceed to a confusing explanation of why they believe the decision below is in conflict with *Summit Health*. Petition at 17. In any event, that case provides no guidance with regard to antitrust standing and nothing further will be said about it in this brief.

Antitrust injury satisfies the constitutional standing requirement of an actual case or controversy. But, as *Associated Gen. Contractors* held, constitutional standing alone is not enough to allow a claimant to prosecute an antitrust action. Under *Associated Gen. Contractors*, it is possible that a person injured by a violation of the antitrust laws is not a proper person to bring a private antitrust claim.

In *Associated Gen. Contractors*, which was an appeal from an order of dismissal under F.R.C.P. 12, it was not necessary to determine whether the plaintiffs would be able to prove the first requirement, antitrust injury. The injury was well-pleaded and assumed, thus satisfying the constitutional standing requirement of an actual case or controversy. Thus, the only question in *Associated Gen. Contractors* was whether the plaintiffs had antitrust standing or, as the court stated, were "proper part[ies] to bring a private antitrust action." *Id.* at 535 n. 31.

The Court's discussion of the factors necessary to answer its question — nature of the injury, character of the relationship between the violation and the injury, potential for duplicative recovery or complex apportionment of damages, and whether there existed more direct victims of the alleged violation — later formed the core of antitrust standing analysis. Each of these factors assumes antitrust injury; they are intended to guide only the determination of whether an injured person is a proper party to prosecute a private antitrust action. *Id.*

Circuit courts, including those cited by Petitioners and the Sixth Circuit in this case, have been remarkably consistent in their application and analysis of the *Associated Gen. Contractors* antitrust standing factors. The only difference between the two lines of cases Petitioners cite is whether antitrust injury is regarded as a part of antitrust standing or as a separate, preliminary requirement. In either case, antitrust injury is required.

Whether the plaintiff suffered an antitrust injury became the first prong of the Second Circuit's standing analysis in *Balaklaw v. Lovell*, 14 F.3d 793 (2nd Cir. 1994). The *Balaklaw* court paraphrased footnote 31 from *Associated Gen. Contractors*, stating that "in order to have standing to prosecute private antitrust claims, plaintiffs must show more than that the defendants' conduct caused them an injury." *Id.* at 797.

In a footnote of its own, the *Balaklaw* court characterized the standing analysis as "two-pronged." "As a necessary first step, courts must determine whether the plaintiff suffered an antitrust injury. If the answer to that question is yes, they must then determine whether any of the [*Associated Gen. Contractors*] factors . . . prevent the plaintiff from being an efficient enforcer of the antitrust laws." *Id.* at 797 n. 9. The term "efficient enforcer" is a shorthand reference to the antitrust standing analysis required by *Associated Gen. Contractors*.

Balaklaw was decided on a motion for summary judgment, so it was necessary for the Circuit Court to determine if a genuine issue of any material fact existed that would require a trial. The Circuit Court concluded as a matter of law that there was no antitrust injury, so it did not address the second prong of its standing analysis. Had it done so, it would have addressed the factors discussed in *Associated Gen. Contractors*. *Id.*

Petitioners also cite *Walker v. U-Haul Co. of Mississippi*, 734 F.2d 1068 (5th Cir. 1984), as an illustration of two-pronged standing analysis. *Walker*, like *Balaklaw*, was decided on a motion for summary judgment. The *Walker* court recognized, as *Associated Gen. Contractors* requires, that proof of both antitrust injury and antitrust standing is essential to recovery on an antitrust claim. *Id.* at 1073. The Circuit Court, affirming summary judgment, found that the plaintiff had not raised any genuine issue of material fact "in regard to [defendant's] claimed antitrust violations." *Id.* at 1074.

Having concluded that the defendant had not violated the antitrust laws, the *Walker* court had no reason to address the *Associated Gen. Contractors* antitrust standing factors. As the Circuit Court explained, "standing defines the plaintiff's right to sue and the existence of injury is a component of the substantive right." *Id.* at 1073.

Petitioners contrast this two-prong form of the analysis with what they call a "multifactor" analysis, exemplified by *Bodie-Rickett and Assocs. v. Mars, Inc.*, 957 F.2d 287 (6th Cir. 1992), and *Greater Rockford Energy and Technology Corp. v. Shell Oil Co.*, 998 F.2d 391 (7th Cir. 1992). *Bodie-Rickett* identified five factors derived from *Associated Gen. Contractors* "on which the standing issue turns . . . ." 957 F.2d at 290.

Despite Petitioners' claim that the *Balaklaw* and *Walker* line of cases conflicts with the *Bodie-Rickett* and *Greater Rockford* line, even their discussion of the alleged difference illustrates that the perceived conflict is an argument over nothing more than semantics. For example, they use almost identical words to describe both lines of cases. According to Petitioners, *Balaklaw* and *Walker* "require a plaintiff asserting an antitrust claim to demonstrate both antitrust injury and antitrust standing," and *Bodie-Rickett* and *Greater Rockford* require "both antitrust injury and standing, using a multifactor, case by case analysis of standing." Petition at 12, 14.

In support of their conclusion that these two lines of cases conflict, Petitioners can muster only a reference to *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438 (11th Cir. 1991). They quote the Circuit Court's statement that "antitrust standing has become somewhat confused." *Id.* at 1449 (quoting *Local Beauty Supply, Inc. v. Lamar, Inc.*, 787 F.2d 1197, 1201 (7th Cir. 1986)).

Todorov described its approach as two-pronged: "First, the court should determine whether the plaintiff suffered 'antitrust injury'; second, the court should determine whether the plaintiff is an efficient enforcer of the antitrust laws, which requires some analysis of the directness or remoteness of the plaintiff's injury." *Id.* The reference to "directness or remoteness" is but another shorthand reference to the *Associated Gen. Contractors* antitrust standing factors.

Courts that describe their analysis as two-pronged first determine whether the plaintiff has suffered an antitrust injury and then proceed to apply the *Associated Gen. Contractors* factors to determine whether that injured person has antitrust standing. Courts that describe their antitrust standing analysis as multipart also first determine whether the plaintiff has suffered an antitrust injury and then go on to apply the *Associated Gen. Contractors* factors.

Both lines of cases apply the *Associated Gen. Contractors* factors. The only difference between the two lines of cases is that the first treats antitrust injury as a separate element of an antitrust claim, while the second treats antitrust injury as part of antitrust standing. This is a distinction without a difference. Petitioners are not the first to notice this insignificant distinction. In fact, one of the cases they cite, *Greater Rockford*, persuasively explains why it is a distinction without a difference:

> "Standing" may be broadly construed to involve all the elements of the cause of action. That is, a plaintiff may not have "standing" unless he can satisfy each requirement of the § 4 action — antitrust violation, antitrust injury and proximate cause. There is some logic to this interpretation, for as we shall discuss, *infra*,

> "standing" limits access to the cause of action to those properly suited to vindicate the violation. A person cannot be the most effective plaintiff if he cannot satisfy all of the elements of § 4. For purposes of clarity and in accord with what seems to be the approach of this circuit, we prefer, however, to treat antitrust injury and standing separately. We will, therefore, refer to standing only when discussing the element of proximate cause. Of course, this is merely a matter of semantics and the essential elements of the § 4 action remain the same under either approach.

Greater Rockford, 998 F.2d at 395 n. 7 (citations omitted).

There is no conflict among the circuits. This Court has more important issues to decide than whether the circuit courts are accurately counting the parts of the antitrust standing analysis.

II.

THE OTHER ISSUES PETITIONERS RAISE ARE NOT APPROPRIATE FOR REVIEW BY THIS COURT IN THIS CASE.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. This is not one of those rare cases.

Petitioners assert that summary judgment was erroneously based on an improper inference that Dr. Leak is fully able to

compete in the marketplace for pain management services because he holds privileges at two hospitals other than Grant. Dr. Leak argues that this inference was improper because it was against him, which is not permitted in a summary judgment proceeding.

It is well-settled that inferences drawn from evidence presented in summary judgment proceedings must be construed in favor of the party opposing the motion. *See, e.g., Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970); *United States v. Diebold*, 369 U.S. 654, 655 (1962). The trial court followed this rule.

In its decision, the court expressly stated that "[t]he evidence must be viewed in the light most favorable to the nonmoving party." Appendix at 6. In fact, the trial court devoted two full pages of its decision to properly stating the rules for decisions on summary judgment motions. Appendix at 6-8.

The evidence before the trial court on the question of Dr. Leak's ability to compete was provided by Dr. Leak. He submitted an affidavit with an attached listing of managed care and traditional insurance plans and the hospitals in the Columbus area each of the plans designates as "participating."

Seven of the managed care plans and three of the traditional insurance plans on Dr. Leak's list designate as participating hospitals either or both of the hospitals where Dr. Leak has privileges. On the record, the trial court was correct to find as a matter of law that Dr. Leak was not foreclosed from competing with other pain management physicians.[2]

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2. Dr. Leak attempts to avoid this evidence by claiming that "no member of the medical staff of Grant or [Respondent Grant Anesthesia Associates, Inc.] has training or qualifications comparable to Dr. Leak's in the field of (Cont'd)

This Court need not take this case to set forth or clarify the law in regard to inferences in summary judgment proceedings. The law in that regard is clear and the trial court applied the correct rule of law.

Petitioners also assert that the exclusive contract between Grant and GAA is an unlawful tying arrangement and a group boycott. The culprit, according to Petitioners, however, is not Grant, but managed care. Insurance companies, according to Petitioners, restrict competition for those patients who belong to managed care plans that designate Grant or another hospital other than those two where Dr. Leak has privileges as participating hospitals.

If Petitioners have a grievance with the managed care plans, this is not the place to resolve it — Petitioners chose not to join any managed care plans as parties to this action. This is an inappropriate case to attempt to determine whether the intersection of exclusive hospital contracts and managed care amounts to an antitrust violation for which Petitioners have standing to sue.

(Cont'd)

pain medicine" and that he is the only Columbus physician "who practices pain medicine." Petition at 6, 17. These statements are untrue. The contract between Grant and GAA provides that GAA is responsible for "the development, implementation, and continuous improvement in a comprehensive pain management program in cooperation with the Hospital." A quick reference to the Columbus, Ohio telephone yellow pages directory lists other physicians specializing in "pain management," including a group at Ohio State University Medical Center.

CONCLUSION

The petition for a writ of certiorari should be denied because the law among the circuit courts in regard to the test for antitrust standing is not in conflict. Furthermore, none of the other issues Petitioners raise are appropriate for review by this Court in this case.

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No. 96-1531

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

W. DAVID LEAK, M.D. AND PAIN CONTROL CONSULTANTS, INC. *Petitioners,*

against

GRANT MEDICAL CENTER; GRANT ANESTHESIA ASSOCIATES, INC.; BHAGWAN SATIANI, M.D.; JAMES HIGHLY, D.O.; SAMBIT K. BARUA, M.D.; M. FARID EDWARDS, M.D.; MICHAEL MCKAY, M.D.; CHANG KIM, M.D.; LEE K. ROH, M.D.; KAREN LOGAN, M.D.; JON T. PRESTON, M.D.; BRADLEY GETZ, M.D.; AND PAUL ADDESSI, M.D. *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS GRANT ANESTHESIA ASSOCIATES, INC., DRS. HIGHLY, BARUA, EDWARDS, MCKAY, KIM, ROH, LOGAN, PRESTON, AND GETZ'S BRIEF IN OPPOSITION

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I. STATEMENT OF THE CASE

Petitioner W. David Leak, M.D. ("Dr. Leak") and his professional corporation, Pain Control Consultants, Inc. ("PCC") provide medical management services for acute and chronic pain in the Columbus, Ohio area. Respondent Grant Medical Center ("Grant") has entered into an exclusive contract for anesthesia and pain control services with Respondent Grant Anesthesia Associates, Inc. ("GAA") Dr. Leak is not an employee of GAA and is not eligible for privileges at Grant for pain control services.

Petitioners brought this antitrust action alleging that they are unable to compete in the market for pain control services because certain managed care plans designate Respondent Grant as a participating hospital but do not designate the hospitals where Dr. Leak has privileges.

Dr. Leak has staff privileges at two Columbus hospitals, which according to Dr. Leak's evidence in his Opposition to Respondents' Motion for Summary Judgment, are contracted as service providers for patients of at least seven managed care plans and three traditional indemnity insurance plans. Petitioners did not

join any managed care plans as parties to this action.

All Respondents filed motions for summary judgment on the basis that Dr. Leak and his professional corporation did not have standing to sustain a private antitrust claim. Before ruling on the motions, the trial court granted an additional seven months for Petitioners to conduct discovery on the standing issue.

II. REASONS FOR DENYING THE WRIT

A. NO CONFLICT OF LAW EXISTS AMONG THE CIRCUITS

Petitioners have alleged a conflict of law among the circuit courts regarding the test for antitrust standing. In order to create the alleged conflict, Petitioners center their attention on non-substantive differences in the circuit court decisions rather than on the meaning of antitrust standing.

Petitioners argue that the purported conflict is caused by inconsistent application of the requirements set forth in Associated General Contractors of California, Inc. v. California State Council of Carpenters, et.al., 459 U.S. 519 (1983). Associated Gen. Contractors holds that an antitrust plaintiff must plead and prove both antitrust injury and antitrust standing. Antitrust injury is the

constitutional prerequisite of an actual case or controversy. However, meeting the constitutional standing requirement alone is not sufficient for an injured party to be an appropriate person to bring an antitrust action.

In Associated Gen. Contractors, this Court did not review the plaintiff-union's constitutional case or controversy standing requirement of "antitrust injury," the initial prong of the test. The injury was well-plead and assumed from the case's posture as an appeal from an order of dismissal under F.R.C.P. 12.

Therefore, the sole consideration in Associated Gen. Contractors was whether the plaintiffs had met the second prong of the test, "antitrust standing." The Court's inquiry looked to whether plaintiffs were "proper part[ies] to bring a private antitrust action." Id. at 535 n.31.

The Court held that analysis of several additional factors was necessary under the second prong of the antitrust standing test. These factors focused on the nature of the injury, character of the relationship between the violation and the injury, potential for duplicative recovery or complex apportionment of damages, and

whether there existed more direct victims of the alleged violation. The analysis of these additional factors form the core of current antitrust standing inquiry to discern whether an injured person is a proper party to prosecute a private antitrust claim. Id.

The Circuit Courts have consistently applied the Associated Gen. Contractors antitrust standing analysis. The only differentiation in application of the test in the cases cited by Petitioners is whether antitrust injury is considered as a part of antitrust standing analysis or as a separate, preliminary requirement. In either case, antitrust injury is required.

Petitioners cite Balaklaw v. Lovell, 14 F.3d 793 (2nd Cir. 1994) and Walker v. U-Haul Co. of Mississippi, 734 F.2d 1068 (5th Cir. 1984), as representative of two-pronged standing analysis. The Balaklaw court held "[a]s a necessary first step, courts must determine whether the plaintiff suffered an antitrust injury. If the answer to that questions is yes, they must then determine whether any of the [Associated Gen. Contractors] factors . . . prevent the plaintiff from being an efficient enforcer of the antitrust laws." Id. at n.9. The term "efficient enforcer" has become the nomenclature

for the second prong "antitrust standing" analysis required by Associated Gen. Contractors.

Balaklaw was before the Circuit Court on a motion for summary judgment. The Circuit Court concluded as a matter of law that there was no antitrust injury and the requirement of the first prong was not met. Therefore, the Circuit Court never considered the Associated Gen. Contractors' factors analysis of efficient enforcer. However, the Balaklaw court referenced the Associated Gen. Contractors factor analysis stating that "in order to have standing to prosecute private antitrust claims, plaintiffs must show more than that the defendants' conduct caused them an injury". Balaklaw at 797.

Walker, like Balaklaw, was decided on a motion for summary judgment. The Walker court recognized, as Associate Gen. Contractors requires, that proof of both antitrust injury and antitrust standing were essential prerequisites to recovery on an antitrust claim. Walker at 1073. The Circuit Court, affirming summary judgment, found that the plaintiff had not raised any genuine issue of material fact "regarding. . .[defendant's] claimed

antitrust violation." Id. at 1074.

Having concluded that the defendant failed to sustain the first prong of the analysis, the Walker court had no opportunity to consider the Associated Gen. Contractors second prong antitrust standing factors stating "standing defines the plaintiff's right to sue and the existence of injury is a component of the substantive right." Walker at 1073.

Petitioners contrast the two-prong analysis of Balaklaw and Walker with an alleged substantively different "multifactor" analysis found in Bodie-Rickett and Assocs. v. Mars, Inc., 957 F.2d 287 (6th Cir. 1992) and Greater Rockford Energy and Technology Corp. v. Shell Oil Co., 998 F.2d 391 (7th Cir. 1992). Bodie-Rickett identified five factors "on which the standing issue turns . . . ." citing Southhaven Land Company v. Malone and Hyde, Inc., 715 F.2d 1079 (6th Cir.1983) where the Sixth Circuit first applied the Associated Gen. Contractors factor analysis. Bodie-Rickett at 290.

Greater Rockford after review of the purported discord in antitrust standing analysis, found the distinctions as "merely a matter of semantics and the essential elements of the [Clayton Act] §4

action remain the same under either approach." Id. at 391 n. 7.

In support of their conclusion that these two lines of cases conflict, Petitioners reference only to Todorov v. DCH Healthcare Authority, 921 F.2d 1438 (11th Cir. 1991). Despite the Circuit Court's statement in Todorov that "antitrust standing has become somewhat confused," Id. at 1449, Todorov ascribes to a two-pronged approach: "First, the court should determine whether the plaintiff suffered an 'antitrust injury'; second, the court should determine whether the plaintiff is an efficient enforcer of the antitrust laws, which requires some analysis of the directness or remoteness of the plaintiff's injury." Id. The commentary on "directness or remoteness" is a direct reference to the Associated Gen. Contractors antitrust standing factors.

Courts that describe their analysis as two-pronged first determine whether the plaintiff has suffered an antitrust injury and then proceed to apply the Associated Gen. Contractors factors to determine whether that injured person has antitrust standing. Courts that describe their antitrust standing analysis as multipart also first determine whether the plaintiff has suffered an antitrust injury and

then go on to apply the Associated Gen. Contractors factors. The only difference between the two lines of cases is that the first treats antitrust injury as a separate inquiry, while the second treats antitrust injury within the antitrust standing factor analysis. There is no substantive difference.

Petitioners also argue that the decision below is in "direct conflict" with Summit Health, LTD v. Pinhas, 500 U.S. 322 (1991). Petition at 16-17. However, no conflict exists between the decision below and Summit Health. Summit Health addressed the nexus between the denial of clinical privileges to one physician and the jurisdictional requirement for an effect on interstate commerce.

There is no conflict among the circuits on antitrust standing analysis or application.

B. THE PETITIONERS RAISE OTHER ISSUES NOT APPROPRIATE FOR REVIEW BY THIS COURT IN THIS CASE.

Petitioners allege an improper inference was drawn in the decision below on motion for summary judgment. Petitioners argue that the inference that Dr. Leak is fully able to compete in the market for pain control services because he holds privileges at two

hospitals other than Grant was erroneous. Dr. Leak argues that this inference was improper because it was allegedly drawn against him, which is not permitted in summary judgment proceedings.

The trial court followed the well-settled rule that inferences drawn from evidence presented in summary judgement proceedings must be construed in favor of the party opposing the motion. United States v. Diebold, 369 U.S. 654, 655 (1962). In its decision, the court citing Adickes v. S. H. Kress and Co., 398 U.S. 144, 157 (1970) stated that "[t]he evidence must be viewed in the light most favorable to the nonmoving party." Appendix at 6.

Dr. Leak's affidavit was the only evidence before the Court on Petitioners' ability to compete. Dr. Leak submitted information on seven managed care plans and three traditional insurance plans which designate the facilities where Dr. Leak has privileges as participating hospitals. On the record before it, the trial court found as a matter of law that Dr. Leak was not foreclosed from competing.

Petitioners argue that managed care and insurance companies restrict competition for patients in plans that designate any hospital

other than those two where Dr. Leak has privileges as participating hospitals. Yet, Petitioners did not to join any managed care plans as parties to this action.

Instead Petitioners allege that the exclusive contract between Grant and GAA is an unlawful tying arrangement and a group boycott fostered by the managed care plans. This is an inappropriate case to attempt to determine whether the intersection of exclusive hospital contracts and managed care amounts to an antitrust violation for which Petitioners have standing to sue.

III. CONCLUSION

The petition for a writ of certiorari should be denied because the law among the circuit courts in regard to the test for antitrust standing is not in conflict.

Respectfully Submitted,

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

W. DAVID LEAK, M.D., AND
PAIN CONTROL CONSULTANTS, INC.

Petitioners,

against

GRANT MEDICAL CENTER; GRANT ANESTHESIA ASSOCIATES, INC.; BHAGWAN SATIANI, M.D.; JAMES HIGHLY, D.O.; SAMBIT K. BARUA, M.D.; M. FARID EDWARDS, M.D.; MICHAEL MCKAY, M.D.; CHANG KIM, M.D.; LEE K. ROH, M.D.; KAREN LOGAN, M.D.; JON T. PRESTON, M.D.; BRADLEY GETZ, M.D.; AND; PAUL ADDESSI, M.D.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether conflict among the Circuit Courts of Appeals over the definition of antitrust standing has resulted in improper dismissal of Petitioners' antitrust claims?

The Circuit Courts of Appeals have not uniformly applied the Supreme Court's definition of antitrust standing in *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters et al.*, 459 U.S 519, 103 S.Ct. 897, 74 L.Ed.2d. 723, (1983), resulting in a conflict of law among the circuits. Petitioners Leak and Pain Control Consultants, Inc. now request that this Court grant certiorari to the United States Court of Appeals for the Sixth Circuit to resolve the conflict, and clarify its ruling on standing in *Associated Gen. Contractors, id.*, and establish their standing to maintain their antitrust claims against Respondents.

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I. THE CIRCUIT COURTS OF APPEALS HAVE NOT UNIFORMLY APPLIED THE U.S. SUPREME COURT'S DEFINITION OF ANTITRUST STANDING ANNOUNCED IN *ASSOCIATED GEN. CONTRACTORS OF CALIFORNIA, INC. v. CALIFORNIA STATE COUNCIL OF CARPENTERS ET AL.*, 459 U.S 519, (1983), RESULTING IN A CONFLICT OF LAW AMONG THE CIRCUITS AND THE CREATION OF A *PER SE* RULE AGAINST STANDING IN THE CASE *SUB JUDICE*.

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ARGUMENT FOR GRANTING THE WRIT

I. THE CIRCUIT COURTS OF APPEALS HAVE NOT UNIFORMLY APPLIED THE U.S. SUPREME COURT'S DEFINITION OF ANTITRUST STANDING ANNOUNCED IN *ASSOCIATED GEN. CONTRACTORS OF CALIFORNIA, INC. v. CALIFORNIA STATE COUNCIL OF CARPENTERS ET AL.*, 459 U.S 519, (1983), RESULTING IN A CONFLICT OF LAW AMONG THE CIRCUITS AND THE CREATION OF A *PER SE* RULE AGAINST STANDING IN THE CASE *SUB JUDICE.*

Respondents argue that *Summit Health, LTD., v. Pinhas*, 500 U.S. 322 (1991) does not provide guidance in the instant case because it involved the issue of jurisdiction rather than standing under the antitrust laws. Petitioners disagree. In *Summit Healt,id.,* this Court held that exclusion of a single opthamologist from a relevant market constituted sufficient nexus with interstate commerce to support federal antitrust jurisdiction pursuant to Section 1 of the Sherman Act. The Court found erroneous the contention advanced by the petitioners that a boycott of a single physician could have no effect on interstate commerce and thus could not constitute a violation of the Sherman Act. The Court held that the issue with regard to antitrust jurisdiction is the potential anticompetitive effect of the challenged conduct. Likewise, the issue of standing involves whether the plaintiff has

suffered the type of harm that the antitrust laws are designed to prevent, i.e., the ability to compete. Therefore, both jurisdiction and standing involve inquiry into harm to competition, albeit at different levels of inquiry.

Dr. Leak and all other physicians who are not members of Grant Anesthesia Associates, Inc. (GAA) are completely excluded from competing within a submarket of the patient population. The instant case focuses upon the harm to competition within this submarket. The District Court and the Court of Appeals' presumption that a physician with privileges at another hospital is automatically able to "fully compete" reflects a misapplication of this Court's precedent.

As elaborated in Petitioners' Petition for A Writ of Certiorari, the Circuit Courts of Appeals have taken the factors announced in *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters et al.*, 459 US 519 (1983) and interpreted them to require an antitrust plaintiff to pass various tests in order to demonstrate antitrust standing. With each Circuit employing these factors in different ways to test whether an antitrust plaintiff possesses standing, there is a legitimate issue whether such differences accurately reflect this Court's holding in *Associated Gen. Contractors*, *id.*, and whether such differences provide guidance to potential plaintiffs who may have antitrust claims.

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successfully urged the District Court to find that Petitioners lacked standing to maintain this action on the basis of Dr. Leak's staff privileges at two other Columbus hospitals, and on the basis that patients and the government would be more efficient enforcers of the antitrust laws. In making its finding, the Court drew an inference that because Dr. Leak has staff privileges at two other hospitals, he is fully able to compete in the Columbus area market for pain-related services. The Court then concluded, on the basis of its inference, that Petitioners had not suffered the kind of injury the antitrust laws were designed to prevent. The Court of Appeals affirmed.

The District Court's inference that Petitioners are able to fully compete for pain related medical services rests upon the presumption that a physician who has privileges at one hospital is able to treat the same patients at a different hospital. If this were simply a case of denial of privileges or of an exclusive contract where the affected physician was able to treat the same patients at another hospital, standing might be a legitimate issue. However, under the facts of this case, as plead and supported by the record, this is not the situation.

Respondents' statements with respect to the fact that some managed care insurance companies have designated as providers the hospitals at which Dr. Leak has privileges, is equally irrelevant for the same reason. It is the actions of Respondent Grant Medical Center in denying Dr. Leak staff privileges and the action of Respondents Grant Medical

Center and GAA in entering into an exclusive contract, that have foreclosed Petitioners from being able to provide services to such patients.

In *Jefferson Parish Hosp. Dist. No. 2 et al. v. Hyde*, 466 U.S. 2 (1984), this Court held that an exclusive contract for anesthesiological services would constitute an illegal tying arrangement if patients were forced to purchase the contracting firm's services as a result of the hospital's market power. In *Jefferson Parish, id.*, the Court specifically noted that there was no evidence that patients were unable to go to another hospital that would provide them with their choice of physician.

Petitioners, have suffered antitrust injury because they have been foreclosed as a result of Respondents' actions from being able to compete in providing in-hospital consultations and treatment related to the practice of pain medicine to a significant segment of the Columbus, Ohio patient population. This segment of the population is composed of those patients who, due to their managed care insurance plans, are limited to using either Grant Medical Center or another hospital other than the two hospitals where Dr. Leak has privileges. This segment of the patient population is a discrete sub-market due to the lack of choice that they have to choose one hospital over another. *Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962).

In real practical terms, the two hospitals where Dr. Leak

has privileges are not alternatives for these patients. Therefore, they are not part of the market served by the two hospitals where Dr. Leak has privileges. This is exactly why Dr. Leak seeks to compete in an additional and different market. If these patients were able to freely choose between hospitals, there would be no anticompetitive effect from excluding Dr. Leak from providing services to these patients at Grant Medical Center.

This is the antitrust theory that Petitioners plead and pursued in this action. However, the lower courts' presumption that privileges at another area hospital means that a physician is able to fully compete and, therefore, has not suffered "antitrust injury," creates in effect a *per se* rule on standing, which is contrary to this Court's holdings.

For the above reasons, Petitioners respectfully request that this Court grant certiorari to review the judgment of the Sixth Circuit Court of Appeals.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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